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Privity vs. Proximity: The Supreme Court's Erroneous Reading of the Illinois Brick Doctrine in Apple Inc. v. Pepper

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COMMENT

PRIVITY VS. PROXIMITY: THE SUPREME COURT'S ERRONEOUS READING OF THE *ILLINOIS BRICK DOCTRINE* IN *APPLE INC. V. PEPPER*

*SUZIN A. WIN**

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INTRODUCTION

In the words of Justice Kavanaugh, "'there's an app for that' has become part of the 21st-century American lexicon."[1] Whether to help us count our steps, give us directions, or edit our photos, it is difficult to imagine daily life without a smartphone and the various mobile applications ("apps") that help us do just about anything. In 2007, it was a different world; the first iPhone had just been released and Apple Inc.'s App Store ("App Store") was still in the works.[2] Apple launched its revolutionary App Store in July 2018, and a new digital marketplace for apps developed where users paid and downloaded mobile applications.[3] In the decade that followed, the App Store transformed software distribution.[4] The App Store started out with 500 apps at the time of launch and grew exponentially to 2.56 million apps available to download as of September 2020,[5] with more than 500 million people visiting weekly.[6]

The rapid development of this digital marketplace led the United States Supreme Court to revisit the forty-two year old antitrust precedent set in *Illinois Brick Co. v. Illinois.*[7] In *Illinois Brick,* the Supreme Court decided that under Section 4 of the Clayton Act,[8] direct purchasers have

[1] Apple Inc. v. Pepper, 139 S. Ct. 1514, 1518 (2019).

[2] Stephen Silver, *Apple Details History of App Store on its 10th Anniversary*, APPLE INSIDER, https://appleinsider.com/articles/18/07/05/apple-details-history-of-app-store-on-its-10th-anniversary (last visited Sept. 23, 2020).

[3] *Id.*

[4] *What is Digital Transformation?*, THE ENTERPRISERS PROJECT, https://enterprisersproject.com/what-is-digital-transformation#q1 (last visited Oct. 6, 2020) ("In general terms, we define digital transformation as the integration of digital technology into all areas of a business resulting in fundamental changes to how businesses operate and how they deliver value to customers").

[5] J. Clement, *Number of Apps Available in Leading App Stores 2020*, STATISTA (Sept. 1, 2020), https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/.

[6] Silver, *supra* note 2.

[7] Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

[8] Section 4 of the Clayton Act allows the recovery of damages by "any person injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. §§ 12-27 (1914).

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standing to sue for treble damages due to unfair business practices, while indirect purchasers do not.[9] Over four decades later, in *Apple Inc. v. Pepper*, the Court reevaluated this doctrine.[10] This time, the Court had to determine which party received the "direct purchaser" status in a situation where plaintiffs bought apps from third-party developers in Apple's App store at prices set by the developers.[11]

iPhone users argued that Apple unlawfully monopolized the retail market for the sale of apps, setting higher-than-competitive prices and locking consumers into buying apps only from Apple.[12] Apple asserted a statutory standing defense under *Illinois Brick*, arguing that the plaintiffs did not have standing because they were not direct purchasers from Apple.[13] The Court found that iPhone users who purchased apps from the App Store were direct purchasers because they purchased apps directly from Apple and thus have standing under *Illinois Brick* to sue for damages due to alleged antitrust violations under Section 4 of the Clayton Act.[14]

This decision will potentially change the relationship between digital platforms and their users by allowing consumers to sue technology platforms, despite the presence of third-party developers who made the apps.[15] Additionally, there may be troublesome implications from a procedural standpoint. The Court erred in the manner it interpreted the *Illinois Brick Doctrine* as a contractual privity rule that bars consumers at the bottom of a vertical distribution chain from bringing suit.[16] The Court's errant interpretation led them to declare that the app users had standing to sue for damages as direct purchasers because they contracted directly with Apple and therefore had privity.[17] This declaration contradicts the traditional reading of Section 4 that is based in common law torts, in which plaintiffs who are most proximately harmed are granted standing to sue.[18]

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[9] *Ill. Brick Co.,* 431 U.S. at 729.

[10] *Apple Inc.*, 139 S. Ct. 1514 (2019).

[11] *See Apple Inc.*, 139 S. Ct. at 1527.

[12] *Id.* at 1519.

[13] *Id.*

[14] *Id.* at 1519; *see also* 15 U.S.C. § 15 (a) (stating "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue").

[15] *See* Adi Robertson, *How Apple's Supreme Court Loss Could Change the Way You Buy Apps*, THE VERGE (May 14, 2019), https://www.theverge.com/2019/5/14/18618127/apple-pepper-supreme-court-loss-kavanaugh-opinion-app-store-antitrust-explainer-vergecast.

[16] *Apple Inc.*, 139 S. Ct. 1514 at 1521.

[17] Privity of contract refers to "the relationship between parties to a contract, allowing them to sue each other but preventing a third party from doing so." *Privity*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see Apple Inc.*, 139 S. Ct. 1514 at 1519.

[18] *See* Standard Oil Co. of N. J. v. United States, 221 U.S. 1, 60 (1911) (concluding that the standard of reason applied at common law was intended to be a measure used for the purpose of

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Furthermore, as Justice Gorsuch's dissent points out, the majority's interpretation would allow iPhone users to pursue a claim based on pass-on damages.[19] The pass-on defense is a claim that a member of the distributive chain who was overcharged passed on the price adjustment to reflect the charge and thereby suffered no damage.[20] The theory has been rejected by both *Hanover Shoe, Inc. v. United Shoe Mach. Corp*[21] and the *Illinois Brick Doctrine*.[22] In *Hanover Shoe*, the defendant raised a passing-on defense, stating that plaintiffs did not suffer a Section 4 injury because they overcharged their own customers due to the defendant's alleged illegal price-fixing.[23] Under this pass-on theory, damages would be calculated based on a showing that a direct or intermediate purchaser (in this case, the app developers) passed on the alleged price overcharge to another purchaser in the distribution chain and either suffered no damages or limited damages.[24] The theory was rejected by the Court in *Hanover Shoe*[25] and *Illinois Brick*[26] because it was incompatible with the legislative intent of the Sherman and Clayton Acts.[27]

The majority's reading of the *Illinois Brick Doctrine* as a privity-based rule, whereby iPhones users have standing to sue because they purchased directly from Apple's App Store and hence have "privity," is also erroneous because it is inconsistent with the objectives of the Clayton Act.[28] Antitrust laws were created in order to promote competition and encourage vigorous enforcement of the antitrust laws.[29] The majority's finding that the plaintiffs had standing due to evidence of contractual privity is easily manipulated. Furthermore, recasting the *Illinois Brick Doctrine* in this manner undermines the goals of the antitrust statutes to effectively deter monopolists and encourage private rights of ac-

determining whether certain conduct violates the Sherman Act); *see also* Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L. REV. 42, 42 (1926) (discussing early common law antitrust policies in colonial America).

[19] *See Apple Inc.*, 139 S. Ct. 1514 at 1526 (Gorsuch, J., dissenting).

[20] *Pass-on Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[21] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 483 (1968).

[22] *See Ill. Brick Co.,* 431 U.S. at 729.

[23] *Hanover Shoe, Inc*., 392 U.S. at 488.

[24] *California Supreme Court Rejects "Pass-on" Defense for Antitrust Damages*, CROWELL MORING (July 13, 2010), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/California-Supreme-Court-Rejects-Pass-on-Defense-for-Antitrust-Damages.

[25] *Hanover Shoe, Inc*., 392 U.S. at 488.

[26] *Ill. Brick Co.*, 431 U.S. at 730.

[27] The Clayton Antitrust Act is codified at 15 U.S.C. §§ 12-27 and outlaws the following conduct: (1) Price discrimination; (2) Conditioning sales on exclusive dealings; (3) Mergers and acquisitions when they may substantially reduce competition; and (4) Serving on the board of directors for two competing companies. 15 U.S.C. §§ 12-27 (1914); *see* 15 U.S.C. § 2 (2004).

[28] *See* 15 U.S.C. §15(a) (1970).

[29] Brief of Antitrust Scholars as Amici Curiae in Support of Respondents at 10, Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204) (quoting *Ill. Brick Co.*, 431 U.S. at 745).

tion. Alleged violators may avoid liability by structuring their transactions so that no formal contract exists between them and the consumer.

This Comment proposes that the *Apple* majority should have read the *Illinois Brick Doctrine* through the traditional proximate cause analysis of the Clayton Act.[30] In its primary context, antitrust law was considered a codification of the common law, and any conduct that restrained trade was considered on par with other harmful torts.[31] Accordingly, under the tort concept of proximate cause, the correct plaintiff with standing to bring suit for damages is the one most proximately harmed by the antitrust conduct.[32] iPhone users have a causal link between Apple and themselves due to purchasing apps directly from the App Store and are thus directly harmed by Apple's alleged monopolistic conduct.[33] Moreover, by declaring that iPhone users were direct purchasers under the *Illinois Brick Doctrine* because they contracted with Apple, the majority confirmed a pass-on theory that was rejected by both *Illinois Brick*[34] and *Hanover Shoe.*[35] The *Illinois Brick* opinion was concerned with tracing complex economic adjustments and stated that pass-on cases would allow for apportionment of the recovery throughout the distribution chain and increase the overall costs of recovery.[36] Under a proximate cause analysis, this complexity would be eliminated, as the Court may compute damages through a comparison of markets, rather than estimating the amounts passed on at each stage of the distribution chain.[37]

[30] 15 U.S.C. §§ 12-27 (1914).

[31] *See generally* Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955) (discussing creation of Sherman Act as codifying common law antitrust principles); *see also* William H. Page, *The Scope of Liability for Antitrust Violations,* 37 STAN. L. REV. 1445, 1450-51 (1985) (analyzing the appropriate scope of liability in antitrust via the proximate cause doctrine in tort law).

[32] *See* Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L. J. 809, 810-13 (1977).

[33] *See Apple Inc.*, 139 S. Ct. at 1519.

[34] *Ill. Brick Co.*, 431 U.S. at 730.

[35] *Hanover Shoe, Inc*., 392 U.S. at 488 (holding that courts below properly rejected the assertion of the 'passing on' defense raised by the defendant, claiming the plaintiff suffered no legally cognizable injury because it increased its prices to its own customers).

[36] *Ill. Brick Co.,* 431 U.S. at 745.

[37] *See Apple Inc.*, 139 S. Ct. at 1518.

I. THE PROCEDURAL HISTORY OF *APPLE V. PEPPER*

A. *IN RE APPLE IPHONE ANTITRUST LITIGATION*: THE LOWER COURTS GRAPPLE WITH WHETHER IPHONE USERS HAVE STANDING

In 2011, Robert Pepper and three other consumers filed a class action complaint in the District Court of the Northern District of California alleging antitrust claims against Apple.[38] The plaintiffs alleged that Apple unlawfully monopolized the aftermarket for iPhone applications in violation of Section 2 of the Sherman Act.[39] Section 2 of the Sherman Antitrust Act of 1890 makes it unlawful for any person to monopolize, attempt to monopolize or combine or conspire with any other person or persons.[40]

The plaintiffs contended that Apple had monopolized and attempted to monopolize the market for iPhone apps.[41] The plaintiffs argued that Apple seized the entire distribution market for iPhone applications because the App Store was the only marketplace available for iPhone users to purchase apps.[42] Apple also prohibited app developers from selling iPhone apps through channels other than the App Store and threatened to void iPhone warranties if users downloaded unapproved apps.[43] Furthermore, Apple collected a 30% commission off the price of the apps from independent software developers.[44] Developers also had to purchase a "software development kit" released by Apple that enabled software developers to design applications for an annual price of $99.[45] Due to these fees, the plaintiffs alleged that third-party developers who contract with Apple are forced to sell their applications for higher-than-competitive prices.[46]

Apple argued that the plaintiffs had no standing because the plaintiffs were impermissibly seeking damages for injuries sustained as indi-

[38] *See* In re Apple iPhone Antitrust Litigation, No. 11-cv-06714-YGR, 2013 WL 6253147, at *1 (N.D. Cal. Dec. 2, 2013).

[39] *Id*.

[40] 15 U.S.C. § 2 (2004).

[41] In re Apple iPhone Antitrust Litigation, No. 11-cv-06714-YGR, 2013 WL 6253147, at *1-2 (N.D. Cal. Dec. 2, 2013).

[42] *Id.* at *1.

[43] In re Apple iPhone Antitrust Litigation, 846 F.3d 313, 316 (9th Cir. 2017).

[44] In re Apple iPhone Antitrust Litigation, No. 11-cv-06714-YGR, 2013 WL 6253147, at *1-2 (N.D. Cal. Dec. 2, 2013).

[45] *Id.* at *2.

[46] *See Apple Inc.*, 139 S. Ct. at 1518.

rect purchasers.[47] Section 4 of the Clayton Act authorizes a private right of action for violation of antitrust laws, allowing the recovery of damages by "any person injured in his business or property by reason of anything forbidden in the antitrust laws."[48] The Supreme Court has promulgated a two-part test to determine standing.[49] There must first be a traditional "case or controversy,"[50] and the plaintiffs must allege an "injury-in-fact."[51] Under the *Illinois Brick Doctrine*, in order to maintain an "injury-in-fact" and claim damages under the Clayton Act, only the first party in the chain of distribution to purchase a price-fixed product has standing to sue.[52] Indirect purchasers are precluded from bringing suit based on the theory that unlawful overcharges were passed on to them by intermediaries who purchased from the alleged violator.[53]

Apple conceded that there is a 30% fee that Apple collects and that app purchasers pay the fee directly to Apple for every app they purchase.[54] However, Apple argued that collection of the fees from the app purchasers is irrelevant because the app developers first bear Apple's fee.[55] In Apple's view, the cost is passed through from the app developers to the app purchasers.[56] As such, the plaintiffs achieved indirect purchaser status.[57] The district court agreed with Apple and granted Apple's motion to dismiss, holding that iPhone users were indirect purchasers without standing under the *Illinois Brick Doctrine*.[58] The plaintiffs appealed.[59]

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[47] In re Apple iPhone Antitrust Litigation, 11-cv-06714-YGR, 2013 WL 6253147, at *10 (N.D. Cal. Dec. 2, 2013).

[48] 15 U.S.C. §§ 12-27.

[49] "Standing" is a party's right to make a legal claim or seek judicial enforcement of a duty or right. To have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question. *Standing*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[50] *See* Flast v. Cohen, 392 U.S. 83, 95 (1968) (holding that "no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, [or] when the question sought to be adjudicated has been mooted by subsequent developments").

[51] *See* Lujan v. Defenders of Wildlife, 504 U.S. 556, 560 (1992) (holding that respondents bear the burden of showing standing by establishing an injury in fact is "(a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical' ") (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

[52] *See Ill. Brick Co.,* 431 U.S. at 724.

[53] In re Apple iPhone Antitrust Litigation, 11-cv-06714-YGR, 2013 WL 6253147, at *9 (N.D. Cal. Dec. 2, 2013).

[54] *Id.* at *5.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at *6-7.

[59] *See* In re Apple iPhone Antitrust Litigation, 846 F.3d 313 (9th Cir. 2017).

The United States Court of Appeals for the Ninth Circuit reversed the district court's decision.[60] The Ninth Circuit reasoned that because Apple was the distributor of the apps and sells them directly to purchasers through its App Store, the plaintiffs had standing to sue Apple as direct purchasers.[61] The Ninth Circuit did not discuss whether the developers of the apps were also direct purchasers because the issue had no impact on the analysis of the case.[62] The court narrowed down the issue to deciding whether Apple is a manufacturer from whom the plaintiffs purchased indirectly, or whether Apple is a distributor from whom the plaintiffs purchased directly.[63] The court struck down Apple's argument that it does not sell apps, but rather sells software services to developers and thus cannot simultaneously be a distributor of apps to iPhone users.[64] Instead, the court reasoned that these third-party developers did not have their own "stores," and as part of Apple's alleged anti-competitive behavior, Apple specifically forbade developers and iPhone users to purchase apps from anywhere other than the App Store.[65] The Ninth Circuit concluded that purchasers of apps were not indirect purchasers because Apple was a distributor selling directly to consumers through its App Store.[66] The court interpreted the *Illinois Brick* standing analysis as a question of whether the party is a manufacturer or a distributor.[67] Consequently, the court concluded that the plaintiffs were direct purchasers of the apps and thus had standing under the Clayton Act to seek damages for Apple's alleged monopolization.[68] Apple appealed the decision, and the Supreme Court granted writ of certiorari.[69]

B. *Apple Inc. v. Pepper:* The Supreme Court's Take on the *Illinois Brick Doctrine*

In deciding *Apple*, the Supreme Court construed the *Illinois Brick Doctrine* as a rule that bars suits from indirect purchasers who are two or more steps removed from the antitrust violator in a vertical distribution

[60] *Id.* at 324.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 322.

[64] *Id.* at 323.

[65] *Id.* at 324.

[66] *Id*.

[67] *Id.*

[68] *Id.* at 322.

[69] "Certiorari" refers to an "extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review." *Certiorari*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see Apple Inc.,* 138 S. Ct. 1514.

chain.[70] The majority stated that the ruling followed from a statutory analysis of Section 4 of the Clayton Act, in which immediate buyers from the alleged antitrust violators may maintain a suit against the antitrust violators.[71] The majority ruled that plaintiffs were not consumers at the bottom of the distribution chain because the plaintiffs purchased the apps directly from Apple.[72] Despite the presence of the third-party developers, the plaintiffs paid the alleged overcharge directly to Apple and thus there was no intermediary in the distribution chain between Apple and the plaintiffs.[73]

In Justice Gorsuch's dissenting opinion, he argued that the majority should have interpreted the *Illinois Brick Doctrine* as a proximate cause rule instead of a contractual privity rule, in which only consumers who directly buy from the alleged violator have standing to sue.[74] Gorsuch noted that the *Illinois Brick* decision had "nothing to do" with privity of contract.[75] In Gorsuch's opinion, unless Congress provides otherwise, the Court generally reads the Clayton Act's statutory cause of action as limited to plaintiffs who are proximately injured by violations of the statute.[76] Under this analysis, suits are barred from plaintiffs who are derivatively injured by a third-party due to the defendant's acts.[77]

Furthermore, Gorsuch argued that the majority let a pass-on case proceed by wrongfully recasting the *Illinois Brick Doctrine* as a rule that only forbade suits where the plaintiff does not contract directly with the defendant.[78] Gorsuch noted that *Illinois Brick* ruled against the pass-on theory, holding that a plaintiff does not have standing to sue based on an allegation that an intermediary distributor may have passed the defendant's alleged overcharge onto the plaintiff.[79] In Gorsuch's view, *Illinois Brick* rejected pass-on theories of damages because it would allow plaintiffs at each level in the distribution chain to assert conflicting claims to a common fund.[80] Gorsuch argued that the majority's decision would re-

[70] The vertical distribution chain is exemplified in the following scenario: if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A, although B may. In this scenario, C exemplifies an indirect purchaser two or more steps removed from the alleged violator. In contrast, direct purchasers, such as B, are immediate buyers of the distributor's product and have standing to sue. *Apple Inc.*, 139 S. Ct. at 1519-21.

[71] *Id.* at 1521 (quoting Kansas v. UtiliCorp United Inc., 497 U.S. 199, 207 (1990)).

[72] *Id.*

[73] *Id.*

[74] *Id.* at 1529-30 (Gorsuch, J., dissenting).

[75] *Id.* at 1530 (Gorsuch, J., dissenting).

[76] *Id.* at 1527 (Gorsuch, J., dissenting).

[77] *Id.* (Gorsuch, J., dissenting).

[78] *Id.* at 1526 (Gorsuch, J., dissenting).

[79] *Id.* (Gorsuch, J., dissenting).

[80] *Id.* at 1528 (Gorsuch, J., dissenting). A common fund is a monetary amount recovered by a litigant or lawyer for the benefit of a group that includes others, the litigant or lawyer then being

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sult in the federal courts having the cumbersome burden of apportioning claims among all potential plaintiffs that could have absorbed part of the overcharge.[81] The calculation of damages would be difficult, considering that each app is sold at a different price and it is uncertain how much of that price is passed on from the developers.[82] Gorsuch concluded that calculating damages for pass-on plaintiffs (in this case, the app purchasers) would be "unduly complicated."[83] Therefore, the best plaintiff to bring suit are the app developers, as they were directly engaged with and injured by the defendant.[84]

II. The Development of Antitrust Standing To Sue

A. The Antitrust Statutes and Their Applications

The Sherman Act was enacted in 1890, proscribing trusts and conspiracies that would restrain trade and reduce economic competition.[85] The Act was passed in response to the fast-paced industrialization of the United States, where huge fortunes were amassed by businessmen and builders and operators of the railroad.[86] The rest of Americans who worked as farmers, traders, laborers, and individual business proprietors were frequently rendered helpless, and Congress wanted to address the disparity of wealth that was due to businesses maximizing profits by minimizing competition.[87] Although Congress passed the Act to preserve the economic values of competition in business and freedom in trade, the general trend towards *laissez-faire* economics made the courts less inclined to enforce the laws.[88] The Supreme Court declared in multiple cases that the Sherman Act did not prohibit every restraint of trade but

entitled to reasonable attorney's fees from the entire amount. *Common Fund*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[81] *Id.* at 1526 (Gorsuch, J., dissenting).

[82] *See id.* at 1528-29 (Gorsuch, J., dissenting).

[83] *Id.* at 1530 (Gorsuch, J., dissenting).

[84] *Id.* at 1530-31 (Gorsuch, J., dissenting).

[85] Trusts are groups of businesses that team up or form a monopoly in order to dictate pricing in a particular market. Will Kenton, *Sherman Antitrust Act,* INVESTOPEDIA (June 29, 2020), https://www.investopedia.com/terms/s/sherman-antiturst-act.asp.; *see* Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7).

[86] Philip Fairbanks, *Antitrust and the Consumer Interest: Can Section 4 of the Clayton Act Survive the Current Supreme Court?*, 27 CATH. U. L. Rev. 81, 82 (1978).

[87] *See* Rush H. Limbaugh, *Historic Origins of Antitrust Legislation,* 18 MO. L. REV. 215, 230-33 (1953).

[88] "Laissez-faire" is a doctrine that favors governmental abstention from interfering in economic or commercial affairs. *Laissez-faire*, BLACK'S LAW DICTIONARY (11th ed. 2019). Philip Fairbanks, *Antitrust and the Consumer Interest: Can Section 4 of the Clayton Act Survive the Current Supreme Court?*, 27 CATH. U. L. Rev. 81, 85 (1978).

only reasonable ones.[89] The lack of enforcement created public outcry for Congress to take action.[90] The Clayton Act was passed in 1914, amending and strengthening the Sherman Act by including specific practices that the Sherman Act did not clearly prohibit, such as activities with undesirable monopolistic tendencies.[91] Sections 4 and 16 of the Clayton Act also provide antitrust plaintiffs with private rights of action.[92]

Under Section 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue."[93] Federal courts interpreted this provision to require that (1) the plaintiff be a person;[94] (2) a violation of the antitrust laws has occurred;[95] (3) the plaintiff suffered an injury to his business or property;[96] and (4) the causal connection between the antitrust violation and the injury to the plaintiff's business or property is sufficiently proximate.[97] The injury must also be reducible to a reasonable dollar amount.[98]

The open-ended language of Section 4 did not provide much guidance about which plaintiff in a chain of distribution would be accorded standing to bring suit.[99] It was not until *Hanover Shoe* that the Supreme Court developed the basis of the current "indirect purchaser" theory of standing.[100] In *Hanover Shoe,* the defendant, a shoe machine company, raised a pass-on defense, stating that the plaintiff, a shoe manufacturer, suffered no legally cognizable injury by the alleged price-fixing or monopolization because it increased the price charged to its own customers.[101] The Court rejected this argument, reasoning that if buyers can show that the price they paid was illegally high, as well as the amount of the overcharge, they have made a prima facie case of injury and damage within the meaning of Section 4.[102] *Illinois Brick* confirmed this analysis, holding that plaintiffs who are not direct purchasers from the alleged

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[89] *Id.*

[90] *Id.*

[91] 15 U.S.C. §§ 12-27 (1970).

[92] 15 U.S.C. § 15 (1970); 15 U.S.C. § 26 (1970).

[93] 15 U.S.C. § 15 (1970).

[94] *Id.*

[95] *Id.*

[96] *See, e.g*., Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972) (the Court interpreting "business or property" as "commercial interests").

[97] Fairbanks, *supra* note 86.

[98] *Id.*

[99] *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. PA. L. REV. 976, 978 (1975).

[100] *Hanover Shoe, Inc.*, 392 U.S. at 502.

[101] *Id.* at 488.

[102] *Id.*

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violators may not maintain an antitrust suit under Section 4 of the Clayton Act.[103]

B. The Supreme Court's Dismissal of Pass-on Damages and Indirect Purchaser Standing

1. Hanover Shoe *and the Rejection of the Pass-on Damages Defense*

Hanover Shoe was a major case that shaped the jurisprudence of indirect purchaser lawsuits, with the Court's first dismissal of a passing-on defense.[104] The Court declared that the plaintiff suffered an injury within the meaning of Section 4 of the Clayton Act, despite the possibility that it overcharged its own customers due to the alleged illegal price-fixing or monopolization.[105]

In 1968, Hanover Shoe ("Hanover") accused United Shoe ("United") of monopolizing the shoe machinery industry in violation of the Sherman Act.[106] Hanover, a shoe manufacturer and a customer of United, alleged that United's refusal to sell its shoe machinery resulted in unlawful monopolization.[107] Hanover argued that it should recover the difference between what it paid United in shoe machine rentals and what it would have paid had United been willing to sell the machines.[108] Hanover would have bought rather than leased from United had it been given the opportunity to do so, and the cost to Hanover would have been less than the rental paid for leasing the same machines.[109]

United countered that Hanover suffered no legally cognizable injury within the meaning of Section 4, as the price that Hanover charged its own customers would have included any of the alleged overcharge that fell upon Hanover.[110] United further contended that if Hanover had bought the machines at a lower price, it would have charged less for the shoes and made no more profit than it made by leasing.[111] United argued that in the circumstance where the alleged victim of the violation could charge his customers a higher price due to alleged illegal price-fixing, the buyer suffers no loss from the overcharge.[112]

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[103] *Ill. Brick Co*., 431 U.S. at 729.
[104] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).
[105] *Id.* at 488.
[106] *Id.* at 483.
[107] *Id.*
[108] *Id.* at 483-84.
[109] *Id.* at 487.
[110] *Id.* at 484.
[111] *Id.* at 488.
[112] *Id.* at 491.

The Court rejected United's pass-on defense, emphasizing the deterrent objective of the antitrust laws.[113] The Court reasoned that as long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows.[114] Furthermore, no matter the price the buyer sells, had the seller not raised illegally high prices, the buyers' profits would be greater.[115] In the Court's opinion, if the pass-on defense were to be allowed, then victims of the alleged overcharge would have to prove that they did not pass on the higher price to their customers.[116] In rejecting United's argument, the Court left open the question of whether only the illegally overcharged direct purchaser can sue for damages, or if others in the chain of distribution may bring suit.[117] However, the Court acknowledged such an issue arising in the future and generally disapproved of it.[118] The Court stated that if the buyers are subjected to the passing-on defense, the ultimate consumers who buy from them would also have to prove that the buyers passed on the higher price.[119] The Court concluded that these ultimate consumers would only have a tiny stake in the lawsuit and would not have interest to attempt a class action, resulting in violators "retain[ing] the fruits of their illegality" because no one was available to bring suit against them.[120]

2. Illinois Brick *and the Indirect Purchaser Rule*

In 1977, the Supreme Court took the case of *Illinois Brick Co. v. Illinois* and addressed whether consumers who did not buy directly from the alleged antitrust violator but from an intermediary have standing to sue and obtain the entire overcharge as damages.[121] The Illinois Brick Company ("the Company") was a manufacturer of concrete bricks that allegedly fixed its prices and sold them to contractors who then built buildings for the State of Illinois ("the State").[122] The State contended that the Company had engaged in a price-fixing conspiracy in violation of the Sherman Act.[123] The Company moved for partial summary judgment against the State, arguing that the State did not directly purchase

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[113] *Id.* at 489.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 494.
[117] *Id.* at 504.
[118] *Id.* at 504.
[119] *Id.* at 494.
[120] *Id.*
[121] Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).
[122] *Id.* at 726-27.
[123] *Id.*

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bricks from them and that under the precedent of *Hanover Shoe,* only direct purchasers could sue for the alleged overcharge.[124]

Although there is an underlying assumption that an intermediary firm (the contractors who bought the bricks) would pass on at least part of the illegal price-fixing to its customers, *Illinois Brick* determined that pass-on damages could not be used offensively for the plaintiff if they could not be used defensively for the defendant, as occurred in *Hanover Shoe*.[125] The Court reasoned that allowing offensive uses of pass-on damages but not allowing defensive uses would create a serious risk of multiple liability for defendants.[126] *Illinois Brick* declined to abandon *Hanover Shoe*'s construction of Section 4, whereby the overcharged direct and not others in the chain of distribution is the "party injured in his business or property."[127]

In response to the State's argument to limit *Hanover Shoe* and allow a pass-on theory to be used offensively, the Court stated that the risk of duplicative recoveries created by unequal application of *Hanover Shoe* is "much more substantial" than in situations where a defendant is sued by two different plaintiffs asserting claims to a common fund.[128] The Court determined that "a one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications and. . . unwarranted multiple liability for the defendant."[129] The result, in the Court's opinion, would be overlapping recoveries that are *certain to result* unless the indirect purchaser is unable to establish any pass on whatsoever.[130]

Consequently, the Court held that the first purchaser in a vertical distribution chain was the direct purchaser, and this direct purchaser should obtain the entire overcharge as damages, without reduction for the amount that it had passed onto other purchasers beneath it in the distribution chain.[131] Accordingly, the *Illinois Brick Doctrine* developed, whereby indirect purchasers are unable to bring suit for damages due to violations of the Sherman Act, as they are presumed to have already been recovered in full by the direct purchaser.[132]

[124] *See id*. at 729 (citing Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 483 (1968)).

[125] *Id.* at 727.

[126] *Id.* at 730.

[127] *Id.* at 729.

[128] *Id.* at 730.

[129] *Id.*

[130] *Id.*

[131] *Id.* at 732-33.

[132] *See id.* at 729-31.

https://digitalcommons.law.ggu.edu/ggulrev/vol51/iss2/3

III. THE COURT'S ERRONEOUS APPLICATION OF THE *ILLINOIS BRICK DOCTRINE* IN *APPLE V. PEPPER*

A. DIRECT PURCHASER STANDING BASED ON CONTRACTUAL PRIVITY CONTRADICTS THE OBJECTIVES OF THE CLAYTON ACT

The majority in *Apple* concluded that because the plaintiffs purchased the apps directly from Apple, they were direct purchasers with standing to bring suit.[133] In the majority's view, evidence of privity of contract between the two parties is what establishes standing under the *Illinois Brick Doctrine*.[134] A privity-based analysis of *Illinois Brick*'s rule is erroneous, as it is plainly inconsistent with the objective of Section 4 of the Clayton Act.[135] As such, thirty states and many associations filed amicus briefs advocating that the indirect purchaser rule contradicts the purpose of the Clayton Act.[136] In an amicus brief filed by The Antitrust Scholars, the Scholars argued that antitrust laws were created in order to promote competition and encourage the "vigorous private enforcement of the antitrust laws."[137] The Sherman Act and the Clayton Act created a private right to action, and in the opinion of the Antitrust Scholars, maintaining robust private enforcement of the antitrust laws is particularly important in our current technological market.[138]

Apple's majority's decision can impact private enforcement by making wronged parties less likely to pursue litigation. The majority rejected Apple's argument that barring iPhone owners from suing will better promote effective enforcement of antitrust laws.[139] In the majority's view, leaving consumers "at the mercy of" monopolistic retailers because upstream suppliers could *also* sue the retailers "make[s] little sense" and

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[133] *Apple Inc.*, 139 S. Ct. at 1519.

[134] *Id.*

[135] "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. §15(a) (1970).

[136] *See* Kathy L. Osborne, Susanne A. Johnson & Anna E. Salstrom, *Future of Antitrust Class Actions Foreshadowed in* Apple Inc. v. Pepper, FAEGRE DRINKER (May 23, 2019), https://www.faegredrinker.com/en/insights/publications/2019/5/future-of-antitrust-class-actions-foreshadowed-in-apple-inc-v-pepper.

[137] Brief of Antitrust Scholars as Amici Curiae in Support of Respondents at 10, Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204) (quoting Ill. Brick Co. v. Illinois 431 U.S. 720, 745 (1977)).

[138] *Id.*

[139] *Apple Inc.*, 139 S. Ct. at 1524.

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would directly contradict the longstanding goal of effective enforcement and consumer protection in antitrust cases.[140]

However, the majority failed to address the role of the app developers in the chain of distribution. By categorizing Apple as a distributor and the plaintiffs as direct purchasers because they contracted directly with Apple, the majority ignored the presence of the app developers–the party who is presumably most harmed by Apple's alleged monopolization.[141] To construe the *Illinois Brick Doctrine* as a privity-based standing theory makes it so that the app developers are less likely to bring suit successfully, as Apple may avoid liability through structuring their transactions so that no formal contracts exist between the parties.

The Antitrust Scholars raised this issue, emphasizing that the number of individuals with incentive to bring suit against giant technology companies such as Apple is already limited.[142] Furthermore, the brief claimed that this analysis would undermine enforcement by permitting monopolists to avoid liability through "clever transactional structuring."[143] In the Scholars' opinion, such an analysis would directly conflict with the Clayton Act's objectives of promoting competition and deterring complete concentrations of power, as economically identical transactions could be structured to vest the "direct purchaser" status on the party that is least likely to sue.[144]

The majority agreed with the brief's claim that plaintiffs should be accorded standing as direct purchasers.[145] However, the justification behind its rationale fundamentally contradicts the objectives of the Clayton Act because the interpretation of the *Illinois Brick Doctrine* is formulistic in nature. In its holding, the majority highlighted the three primary goals promoted by the *Illinois Brick* decision: "(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants."[146] The majority's interpretation of the *Illinois Brick Doctrine* is contradictory to these objectives. Extending the *Illinois Brick Doctrine* to bar app store purchasers because of the presence of an intermediary would limit the pool of potential private enforcers. Yet the majority found that the plaintiffs had established standing for the reason that they

[140] *Id.*

[141] *See Apple, Inc*., 139 S. Ct. at 1519.

[142] Brief of Antitrust Scholars as Amici Curiae in Support of Respondents at 9, Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204).

[143] *Id.*

[144] *Id.*

[145] *Apple Inc.*, 139 S. Ct. at 1524.

[146] *Id*. at 1524.

were not consumers at the bottom of the vertical distribution chain.[147] The majority determined that there was no intermediary in the distribution chain because the plaintiffs purchased directly from Apple's App Store and therefore were direct purchasers.[148] The opportunity to overrule *Illinois Brick* was declined by the majority, the reason being that there was "no occasion" to consider that argument because the plaintiffs purchased directly from Apple.[149]

The majority's reasoning is flawed, however, because it essentially ignores the presence of the third-party developers and fundamentally misstates that *Illinois Brick* forbids only suits where plaintiffs do not have standing under the Clayton Act because they did not contradict directly with the alleged violator.[150] This contractual privity analysis is inconsistent with the objective of the Clayton Act and the guidelines set by *Illinois Brick*, as it is easily manipulated. Recasting the *Illinois Brick Doctrine* in this manner would undermine the deterrence effects of the antitrust statutes and private enforcement, as pass-on cases may proceed only by showing the plaintiff contracted directly with the defendant. A privity analysis expands the *Illinois Brick Doctrine,* as potential antitrust violators may avoid liability by structuring their transactions such that no formal contract exists between them and the consumer. This liability avoidance contradicts the Clayton Act's objective of giving action to "any person" injured by the antitrust violation.[151]

Moreover, the *Apple* majority's privity analysis cuts against *Illinois Brick*'s intention to avoid complicated damages calculations and eliminate duplicative damages.[152] The majority dismissed long-standing arguments from *Hanover Shoe* and *Illinois Brick* which state that allowing indirect purchasers to sue cuts sharply against deterrence and may render damages calculations incredibly complex.[153] The majority reasoned that a complex damages calculation is "hardly unusual in antitrust cases," and that the *Illinois Brick Doctrine* is not a "get-out-of-court free card" for monopolistic retailers to play any time that a damages calculation may be complicated.[154] However, *Illinois Brick* stated that *whole new dimensions of complexity* would be added to treble-damages suits, undermining their effectiveness, if the use of pass-on theories were allowed. *Illinois*

[147] *Id.* at 1521.
[148] *Id.*
[149] *Id.* at 1521 n.2.
[150] *Id.* at 1521.
[151] *See* 15 U.S.C. § 15 (1970).
[152] *Ill. Brick Co*., 431 U.S. at 730-3.
[153] *Apple Inc.*, 139 S. Ct. 1524-25.
[154] *Id.*

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Brick's concern was not matched by the *Apple* majority's dismissal that these damages calculations are "hardly unusual" in antitrust cases.[155]

Furthermore, the majority reasons that damages calculations under the *Illinois Brick Doctrine* may be equally as complicated, stating that there may be no difference between a retailer markup case and a retailer commission case.[156] However, the majority gave no grounds on how to conduct the damages analysis.[157] Managing these calculations in "the real economic world rather than an economist's hypothetical model" was a concern *Hanover Shoe* expressed.[158] Through its refusal to discuss a method to calculate these damages, the majority failed to heed the warning established by the prior court decisions. Furthermore, they did not acknowledge the impact that a lack of a damages calculation method may have on private enforcement.

B. A Proximate Cause Analysis Has Been Traditionally Used to Establish Standing Under the Clayton Act

The language of the Clayton Act is open-ended in nature, and many antitrust standing cases represent a judicial effort to instill the statute with greater specificity, based upon judgments about the goals of antitrust law.[159] In its primary context, antitrust law was originally considered to be a codification of the common law.[160] Although Congress did not debate particular common-law limitations in creating the Act, the frequent references to common-law principles implied that Congress assumed antitrust cases are subject to constraints comparable to common-law rules.[161] Any conduct that restrained trade was considered on par with other harmful torts, and consequently courts adopted the tort concept of proximate cause to determine the appropriate antitrust standing and scope of damages.[162] Various cases showcase the application of the traditional common-law tort principle of proximate cause in Section 4 actions.

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[155] *Id.*

[156] *Id.* at 1524.

[157] *See id.*

[158] *Hanover Shoe*, 392 U.S. at 493.

[159] *Clayton Antitrust Act and Sherman Antitrust Act—Antitrust Trade and Regulation—Antitrust Standing—*Apple Inc. v. Pepper, 133 HARV. L. REV. 382, 387 (2019).

[160] *See generally* Dewey, *supra* note 29 (discussing the creation of Sherman Act as codifying common law antitrust principles).

[161] *Id.*

[162] *See* Page, *supra* note 31 (analyzing the appropriate scope of liability in antitrust via the proximate cause doctrine in tort law).

The Supreme Court has observed that Congress enacted Section 4 with language borrowed from Section 7 of the Sherman Act.[163] Before the Clayton Act was passed, lower federal courts had read Section 7 to incorporate common-law principles of proximate causation, and the Supreme Court has reasoned that the congressional use of Section 7 language in Section 4 of the Clayton Act presumably carried the intuition to "adopt the judicial gloss" that avoided a simple literal interpretation.[164] As such, the Supreme Court has held that a plaintiff's right to sue under Section 4 required a showing that the defendant's violation not only was a "but for" cause of injury, but was the proximate cause as well.[165] Proximate cause has been described as "reasonably foreseeable" or "anticipated as a natural consequence."[166] A jury may infer that a causal relation exists in cases where the plaintiff proves a loss that an antitrust violation would be likely to cause.[167] Under such a proximate cause analysis, plaintiffs are entitled to recover all damages proximately caused by the antitrust violation.[168]

Additionally, for plaintiffs to recover treble damages, they must prove more than injury causally linked to an alleged violator's illegal acts.[169] The Supreme Court articulated that in order to maintain a cause of action under Section 4, plaintiffs must prove "antitrust injury."[170] An antitrust injury reflects the anticompetitive nature of either the alleged violation or of the anticompetitive acts made possible by the violation.[171] The Court has stated that an antitrust injury does not necessarily mean that plaintiffs bringing claims under Section 4 must prove an "actual les-

[163] Section 7 of the Sherman Act states, "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. §18.

[164] *See* Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 520, 534 (1983).

[165] Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 267 (1992).

[166] Proximate cause is a cause that is legally sufficient to result in liability: an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor. It is a cause that directly produces an event and without which the event would not have occurred. *Proximate Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see, e.g.*, First Nationwide Bank v. Celt Fund Corp., 27 F.3d 763, 799 (2nd Cir. 1984).

[167] *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 697 (1962).

[168] *See id.* (stating that a causal relation exists where plaintiff proves an injury likely to be caused by antitrust violation).

[169] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[170] *See id.*

[171] *Id.*

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sening of competition" in order to recover.[172] Plaintiffs may prove antitrust injury before competitors are driven out of the market and competition is directly lessened.[173] Furthermore, the antitrust injury must be "attributable to an anti-competitive aspect of the practice under scrutiny."[174] In other words, an antitrust injury is the type of injury that the claimed violations would be likely to cause and one which the antitrust statutes were created to prevent.[175] As the focus of the Sherman Act and the Clayton Act is consumer welfare and protection of the marketplace, courts have construed that an antitrust injury occurs when the injury flows from acts harmful to the consumer.[176] The court has stated that the essence of antitrust injury is the "restriction or distortion of consumer choice by reason of the antitrust defendant's conduct in the market."[177]

Courts have also concluded that an antitrust injury involves a causation requirement in order to define the class of potential plaintiffs eligible to bring suit.[178] The court must determine whether the violation was the cause-in-fact of the injury–that "but for" the violation, the injury would not have occurred.[179] The link between the parties cannot be too remote to satisfy the proximate cause requirement.[180] There must be some direct relation between the injury asserted and the injurious conduct alleged.[181] Therefore, a plaintiff who alleges harm flowing merely from the misfortunes visited upon a third person by the defendant's act is generally too remote to bring a Section 4 claim.[182] The plaintiff must show that the antitrust violation was a "material and substantial factor" that caused their alleged injuries.[183] Findings of numerous intervening economic and market factors may cause a plaintiff to fail to prove injury.[184]

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[172] *Id.*

[173] *Id.* at 489 n.14.

[174] *See* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990).

[175] *Brunswick Corp.*, 429 U.S. at 489 (quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 125 (1969)).

[176] *See* Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1445 (9th Cir. 1993) (finding plaintiff alleging "primary-line discrimination" must prove antitrust injury by showing injury flows from effects of conduct that are harmful to consumer welfare).

[177] *See* Sullivan v. Tagliabue, 34 F.3d 1091, 1101 (1st Cir. 1994).

[178] *See* Greater Rockford Energy and Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 404 (7th Cir. 1993).

[179] *Id.* at 395 (quoting MCI Communications Corp. v. American Telephone & Telegraph Co., 798 F.2d 1081, 1161 (7th Cir. 1983)).

[180] *See* Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 286 (1992).

[181] *Id.* at 268.

[182] *Id.*

[183] Greater Rockford Energy and Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 402 (7th Cir. 1993) (finding that there were many alternative explanations for the injuries which the plaintiffs alleged, such as reports in the media, state laws that hurt sales, and a termination of state subsidy).

[184] *Id.*

C. J. GORSUCH DISSENTS–THE KEY RELATIONSHIP HE MISSED

Justice Gorsuch critiqued the Kavanaugh-led majority opinion in *Apple,* stating that its interpretation of the *Illinois Brick Doctrine* confused established precedence and created a standard that could be easily manipulated by defendants in antitrust litigation.[185] He reasoned that unless Congress provided otherwise, the courts generally read statutory causes of action as "limited to plaintiffs whose injuries are proximately caused by violations of the statute."[186] This proximate cause requirement typically bars suit from plaintiffs with injuries that are "derivative" and caused by a third-party who is injured directly by the defendant's alleged acts.[187]

Gorsuch primarily argued that app purchasers relied upon pass-on theories to establish damages that were rejected by *Illinois Brick*.[188] Gorsuch stated that these purchasers may only be injured if the developers were able to *and* chose to pass on the overcharge in the form of higher app prices.[189] However, Gorsuch overlooked a key component that the majority honed in on: the relationship between the plaintiffs and Apple. The plaintiffs in *Apple* are able to establish proximate cause because there is a causal link between Apple and themselves, due to their having purchased apps directly from Apple's App Store. This link is *not* too remote to satisfy the proximate cause requirement, because Apple bars iPhone users from purchasing apps from anywhere other than the App Store.[190] Moreover, Apple's alleged monopolization and price-fixing that led to the anti-competitive prices of apps is exactly the type of injury that the antitrust laws were intended to prevent.

Therefore, while Gorsuch's proximate cause analysis was valid because traditionally, courts have construed a proximate cause requirement in determining standing, he failed to discern and recognize the relationship between Apple and the plaintiffs. As the majority points out, iPhone users contract directly with Apple in order to purchase the apps, despite the fact that a third-party develops and markets them on the App Store. Gorsuch's failure to appreciate the relationship entailed his misinterpretation that the plaintiffs are unable to establish standing because they are

[185] *Apple Inc.*, 139 S. Ct. at 1526 (Gorsuch, J., dissenting).

[186] *Id.* at 1527 (Gorsuch, J., dissenting) (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 132 (2014)).

[187] *Id.* (Gorsuch, J. dissenting).

[188] *Id.* at 1528 (Gorsuch, J., dissenting).

[189] *Id.* (Gorsuch, J., dissenting).

[190] *See* In re Apple iPhone Antitrust Litigation, No. 11-cv-06714-YGR, 2013 WL 6253147, at *2 (N.D. Cal. Dec. 2, 2013).

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relying on the pass-on theory and are not proximately harmed.[191] However, the direct relationship between Apple and the plaintiffs as distributor and purchaser satisfies the proximate cause requirement. Consequently, plaintiffs should have standing because Apple's alleged antitrust violation proximately caused their injuries, as the majority correctly concluded.

D. Calculation of Damages Under the Proximate Cause Analysis

Under the proximate cause analysis, damages will be awarded if it is shown that the nexus between the alleged antitrust misconduct and the injury suffered by the plaintiff is sufficiently close.[192] As discussed above, once the plaintiff shows the defendant's violation was a material cause of the plaintiff's injury, a proximate cause analysis justifies an award of damages.[193] Damages are calculated by presenting evidence that compares the before and after effects of the unlawful violation.[194] In prior cases, the Supreme Court had considered it sufficient to qualify damages through a presentation of evidence that compares profits before and after the alleged unlawful violation.[195] The Court has stated that while this approach to qualify the amount of damages is mainly circumstantial, it is competent and "sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury."[196]

In prior cases, the Supreme Court also allowed damages based upon a showing of the difference between a violated market and what the market would have been "but for" the alleged antitrust violation.[197] If the causal connection is less clear-cut, such as when there are multiple alleged violators, plaintiffs may seek damages calculations in the form of the difference between "the amount actually realized by the petitioner and what would have been realized by it from sales at reasonable prices except for the unlawful acts of the respondents."[198] The reasoning behind this logic is that there existed no other economic condition that would

[191] *Apple Inc.*, 139 S. Ct. at 1526 (Gorsuch, J., dissenting).

[192] *See* Perkins v. Standard Oil Co., 395 U.S. 642, 649-50 (1969).

[193] *See* Earl E. Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 NW. U. L. REV. 691, 692 (1963).

[194] *See* Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 364-65, 379 (1927).

[195] *Id.* at 379.

[196] *See id.*

[197] *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

[198] *Id.* at 561.

have caused the difference in the price, as but for the defendant's alleged violation, the prices would have remained the same.[199]

In *Apple,* the majority found that the plaintiffs had standing based on their contractual privity with Apple.[200] The majority ignored the complexity of computing to what extent the individual third-party app developers were able to, and opted to, pass on the 30% commission to customers by increasing the sales price.[201] If the majority had adopted a proximate cause interpretation, the calculation of damages would be based upon a showing that the defendant's violations were a material cause of injury for the plaintiffs. Similarly to established precedence, a proximate cause interpretation would allow the majority to look at the market as a whole.[202] The App Store is the sole marketplace where Apple allows its iPhone users to purchase apps.[203] The market therefore consists solely of Apple, independent third-party developers, and the plaintiffs who purchased the apps.[204] A causal relationship to form proximate causation is satisfied by the fact that the plaintiffs purchased apps directly from Apple's App Store.[205] As a result, the plaintiffs are able to quantify and compute their damages based on a comparison of the current market (with Apple's alleged price-fixing) and a market where such a violation does not occur. Following prior precedence by looking at the market as a whole and computing damages based upon this approach would eliminate the need to estimate "passed-on" damages. As such, the decision would align with the *Illinois Brick* Doctrine's objectives of avoiding complicated damages calculations and duplicative damage awards.

CONCLUSION

The majority in *Apple* should have interpreted the *Illinois Brick* Doctrine under a proximate cause analysis instead of a privity analysis.[206] *Hanover Shoe* and *Illinois Brick* established precedence to effectively deter monopolistic conduct by rejecting pass-on theories, both offensively and defensively.[207] Both courts recognized that Congress's intent in passing the Clayton Act was to encourage private enforcement

[199] *Id.* at 562.
[200] *See Apple Inc.*, 139 S. Ct. at 1519.
[201] *See id.*
[202] *See Story Parchment Co*., 282 U.S. at 563; *see also Eastman Kodak Co*., 273 U.S. at 364–65, 379.
[203] *See Apple Inc.*, 139 S. Ct. at 1519.
[204] *See id.*
[205] *See id.*
[206] *See id.*
[207] *See Ill. Brick Co*., 431 U.S. 720 at 729; *see also Hanover Shoe, Inc*., 392 U.S. 481 at 510.

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of the antitrust laws while avoiding complicated calculations of damages.[208] The majority's reading of the *Illinois Brick* Doctrine as a contractual privity rule undermines Congress's intent behind the antitrust statutes and contradicts the statutory language of Section 4 of the Clayton Act.[209] Furthermore, the majority dismissed a long-standing argument that pass-on damages will be too complicated to calculate, stating that complex damages calculations are "hardly unusual" in antitrust cases.[210] By ignoring the presence of third-party app developers and avoiding the computation of what extent these developers were able to and opted to pass on the alleged overcharge, the majority counterintuitively confirmed a "pass-on" theory of damages.[211]

The language of Section 4 of the Clayton Act is broad and provides recovery to "any person" injured in his business or property by reason of anything forbidden in the antitrust laws.[212] Traditionally, courts have read Section 4 statutory causes of action to be limited to plaintiffs with proximate injuries, whereby there is a showing of an antitrust injury of the kind the antitrust laws were intended to prevent.[213] Furthermore, courts have looked at whether the alleged violation by the defendant was a material and substantial factor that caused the alleged injuries of the plaintiff.[214]

Under a proximate cause analysis, it could be established that the plaintiffs were proximately harmed by Apple's alleged monopoly because Apple bars iPhone users from any other alternative than using Apple's App Store.[215] As a result, the plaintiffs dealt directly with Apple as a distributor of apps, rather than the individual app developers, and thus were subjected to the App Store's alleged price-fixing. Categorizing the iPhone users as proper plaintiffs due to a proximate cause analysis will avoid the pass-on theory of damages that *Illinois Brick* sought to avoid. As such, the district courts will not have the complex task of calculating the amount of overcharge passed on at each stage of the distribution chain. Rather, the district court will simply calculate damages based on the "before and after" method that has been used in prior cases.[216] Such a

[208] *See Ill. Brick Co*., 431 U.S. 720 at 729; *see also Hanover Shoe, Inc*., 392 U.S. 481 at 510.

[209] *See* 15 U.S.C. § 15 (1970); *see also Apple Inc.*, 139 S. Ct. 1514 at 1519.

[210] *See Apple Inc.*, 139 S. Ct. 1514 at 1524.

[211] *See id.* at 1519.

[212] 15 U.S.C. § 15 (1970).

[213] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), *see also* Holmes v. Securities Investor Prot. Corp., 503 U.S. 258 (1992).

[214] *See Greater Rockford Energy and Tech. Corp*., 998 F.2d 391 at 401.

[215] *See Apple Inc.*, 139 S. Ct. 1514.

[216] *See Eastman Kodak Co.,* 273 U.S. at 364–65, 379; *see also Story Parchment Co*., 282 U.S. at 563.

calculation will allow the courts to compute damages based on a comparison of markets and is a more straightforward task.

The *Apple* majority favored compensation to victims in lieu of traditional precedence and objectives set by Congress when enacting the antitrust statutes. However, the decision set the stage for future antitrust defendants to manipulate the privity analysis of the *Illinois Brick Doctrine*. While the majority did not overrule *Illinois Brick,* the nature of the *Illinois Brick Doctrine* has been narrowed and the traditional readings of proximate causation elements into antitrust standing have been rejected. Although the Supreme Court has yet to grant certiorari in the upcoming term for another antitrust case that implicates the *Illinois Brick Doctrine*, it is clear that there is mounting support for its reversal.[217]

Following *Apple*, there also remain looming questions for other large digital platforms, as they could face potential antitrust liability to consumers, despite the presence of an intermediary.[218] The precedent set by *Apple* is that contractual privity gives a purchaser standing to sue, and antitrust violators could open themselves up to potential liability when they act as a distributor, even if they do not set the prices and only facilitate a transaction between buyers and sellers.[219] This precedent may cause companies like Apple to restructure their business models such that they do not maintain privity with parties likely to sue. The ramifications of *Apple* remain unclear. However, the majority's reading of the *Illinois Brick Doctrine* strikes down the private enforcement and deterrence objectives of the antitrust statutes and is likely to lead to easy manipulation by potential defendants. This result is a troubling one, as properly injured private plaintiffs may soon be barred from bringing suit.

[217] *See* Osborne, *supra* note 136.
[218] *See Apple Inc.*, 139 S. Ct. at 1519; *see* Osborn, *supra* note 136.
[219] *See Apple Inc.*, 139 S. Ct. at 1519.

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